

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F403385**

**TARA M. BIRD, EMPLOYEE**

**CLAIMANT**

**WAL-MART ASSOCIATES, INC.,  
SELF-INSURED EMPLOYER**

**RESPONDENT**

**CLAIMS MANAGEMENT, INC., TPA**

**RESPONDENT**

**OPINION FILED DECEMBER 30, 2004**

Hearing before Administrative Law Judge J. Mark White on November 30, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Michael A. LeBoeuf, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Amy Huffman, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On November 30, 2004, the above-captioned claim came on for a hearing in Little Rock, Arkansas. A pre-hearing conference was conducted on August 30, 2004, and a Prehearing Order was entered that same day. A copy of the August 30, 2004, Prehearing Order has been marked as Commission Exhibit No. 1 and made a part of the record herein without objection. At the hearing, the parties confirmed that the stipulations, issues and respective contentions, as amended, were properly set forth in the Prehearing Order.

The parties stipulated that the Arkansas Workers' Compensation

Commission has jurisdiction of this claim; that the employee/self-insured employer relationship existed at all relevant times, including March 25, 2004; and that the claimant earned an average weekly wage of \$223.86.

The parties agreed that the issues to be presented were whether the claimant sustained a compensable injury to her back on March 25, 2004; whether the claimant is entitled to temporary total disability benefits; whether the medical treatment received by the claimant has been reasonably necessary in connection with a compensable injury; and controversion and attorney's fees.

The claimant contends that she sustained a compensable injury to her back on March 25, 2004; that the respondents provided some medical treatment; that she is entitled to temporary total disability benefits from March 25, 2004, to a date yet to be determined; and that her medical bills should be paid by respondents.

Respondents contend that the claimant cannot prove an accidental injury, caused by a specific incident and identifiable by time and place of occurrence, which caused internal or external physical harm to the claimant's back, arising out of the course of employment, which required medical services or resulted in disability or death, and is established by medical evidence supported by objective findings; that the claimant's back problems are not a compensable injury; and that the claimant is not entitled to indemnity benefits with respect to these alleged injuries.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe her demeanor, the following findings of fact and conclusions of law are hereby made in accordance with Ark. Code Ann. § 11-9-704:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The stipulations agreed to by the parties are reasonable and are hereby accepted as fact.
3. The claimant has proven by a preponderance of the evidence that the existence and extent of her injury is established by medical evidence supported by objective findings.
4. The claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment, that her injury was caused by a specific incident and is identifiable by time and place of occurrence, and that her injury caused internal physical harm to the body requiring medical services.
5. The claimant has therefore proven by a preponderance of the evidence that

she sustained a compensable injury on March 25, 2004.

6. The claimant has proven by a preponderance of the evidence that the medical treatment she has received to date for her compensable injury has been reasonably necessary in connection with the compensable injury.
7. The claimant has failed to prove by a preponderance of the evidence that she is totally incapacitated from earning wages.
8. The claimant has therefore failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits.
9. The respondents have controverted this claim in its entirety.

## **DISCUSSION**

### **I. History**

The claimant worked for the respondent as a grocery stocker. On March 25, 2004, the claimant was pulling a pallet jack filled with groceries into the store. She testified that as she pulled the jack she “felt something rip and pop in my back.” She later said that her legs immediately “started going numb.” She reported the injury to a manager who directed her to go home and rest. The claimant testified she had great difficulty walking back to her car and that another worker had to assist her, though she was able to drive home, a five-minute trip.

The next day she completed paperwork reporting the injury and sought treatment from Dr. Greg Smart. Dr. Smart assessed her with “back pain – probable lumbar strain.” He prescribed medication, including one “for muscle spasm.” He placed her on light duty, and she returned to work in a light-duty position.

She returned to Dr. Smart on March 31; Dr. Smart changed her medication and retained her work restrictions. At some point thereafter, the respondent controverted all further treatment. The claimant then sought treatment from her personal physician, Dr. William Harper, on April 13. Dr. Harper diagnosed her with sciatica and prescribed medication. She returned to Dr. Harper on April 26 and then began a program of physical therapy. The therapy was ultimately terminated because it aggravated her back pain.

The claimant continued working light-duty for the respondent until April 30, when the respondent informed her she could not continue working without a full work release from her doctor. She applied for and received a leave of absence from the respondent and has not returned to work since. However, she was a part-time college student at the time of her injury, and she has continued her studies since then in spite of her injury.

On June 3 the claimant underwent an MRI exam at the recommendation of Dr. Harper. The MRI revealed a “posterior broad-based herniated disc at L4-5 with

the most prominent finding seen centrally and slightly to the left of midline and extending slightly inferiorly where it compresses the thecal sac centrally.”

Dr. Harper referred the claimant to Dr. Steven Cathey for a neurosurgical consultation. Dr. Cathey wrote in his July 12 report, “I suspect Ms. Bird did indeed suffer a disc herniation at L4-L5 as a result of the occupational injury of March 25, 2004. I do not, however, believe lumbar disc surgery would be beneficial in this case.” Dr. Cathey assigned a permanent impairment rating of 5% to the body as a whole and released her. Since that time the claimant has received epidural injections from Dr. Minna Ulmer and remains under the care of Dr. Harper.

The claimant does have a history of back pain prior to this incident. In 1997, when she was 14 years of age, she was diagnosed with low back pain and scoliosis. In December 2002 she sought treatment for “generalized musculoskeletal pain,” specifically including low back pain, and was diagnosed with “multifactorial back pain with elements of mechanical, positional, and minimal degenerative disease, overlapping to produce a complex and difficult to manage etiology of back pain.” The claimant described this condition as fibromyalgia. She was again treated for this condition in February 2003. There is no evidence the claimant was treated for back pain or fibromyalgia between then and her alleged work injury.

## II. Adjudication

### A. Compensability

For the claimant to establish a compensable injury as a result of a specific incident, the following requirements of Ark. Code Ann. § 11-9-102 (4)(A)(i) must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. § 11-9-102(16), establishing the existence and extent of the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. *Id.*

The respondents argue in their post-hearing brief that the claimant failed to establish the existence and extent of her alleged injury by medical evidence supported by objective findings. Specifically, the respondents object that subjective complaints of muscle spasms, or a doctors' prescription of medication for spasms,

cannot in and of themselves constitute objective findings. The respondents note that none of the claimant's physicians or therapists specifically noted their own observation of muscle spasms. Dr. Smart did write to the respondents that he observed "no significant evidence of muscle spasm," though it must be said this statement does not necessarily mean he observed no sign of spasm whatsoever.

Though I find the respondents' arguments somewhat persuasive, it is clear that the facts herein are substantially similar to those of the Court of Appeal's recent holding in *Fred's Inc. v. Jefferson*, No. CA 04-166 (Ark. App., Subst. Op. on Denial of Rehearing filed Dec. 15, 2004). There, the Court explicitly held that a doctor's prescription of medication for spasm may constitute an objective finding even in the absence of a recorded observation of spasm. The present claimant not only can show a similar doctor's prescription, but this claimant also has the results of an MRI exam showing a herniated disc. Given this evidence, and given the holding of *Fred's, Inc. v. Jefferson*, I find that the claimant has proven by a preponderance of the evidence that the existence and extent of her injury is established by medical evidence supported by objective findings.

Though the claimant does have a prior history of back problems, more than a year passed from her last medical treatment until her work incident, suggesting that her pre-existing condition is but a minor factor, if a factor at all, in her present

problems. It is clear that her work incident at the very least aggravated a pre-existing back condition. I also note that Dr. Jones specifically described the degenerative spinal component of the claimant's "multifactorial back pain" in February 2003 as "minimal." Finally, though Dr. Cathey did offer an opinion as to a causal relationship, his opinion may not fall within a reasonable degree of medical certainty. Nonetheless, objective medical evidence is not essential to establish the causal relationship between the injury and the work-related accident, where a preponderance of other non-medical evidence establishes the causal relationship. *Horticare Landscape Management v. McDonald*, 80 Ark. App. 45, 89 S.W.3d 375 (2002), citing *Wal-Mart Stores, Inc. v. VanWagner*, 337 Ark. 443, 990 S.W.2d 522 (1999). There is no evidence in the record to cast doubt on the claimant's account of her work incident, or to cast doubt on her subjective reports of back problems. I find that the claimant has proven by a preponderance of the evidence that she sustained an injury arising out of and in the course of her employment, that her injury was caused by a specific incident and is identifiable by time and place of occurrence, and that her injury caused internal physical harm to the body requiring medical services. The claimant has proven every element of a compensable injury; therefore, I conclude that she has proven by a preponderance of the evidence that she sustained a compensable injury on March 25, 2004.

## B. Entitlement to Benefits

An employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. ARK. CODE ANN. § 11-9-508(a). What constitutes reasonably necessary medical treatment is a question of fact. *Ark. Dept. of Correction v. Holybee*, 46 Ark. App. 232, 878 S.W.2d 420 (1994).

There is no medical evidence to suggest that the treatment received by the claimant has been unreasonable or to otherwise contradict the recommendations made by her doctors. Given this lack of contradictory evidence, I find that the claimant has proven by a preponderance of the evidence that the medical treatment she has received to date for her compensable injury has been reasonably necessary in connection with the compensable injury.

An employee who suffers a compensable unscheduled injury is entitled to temporary total disability compensation for that period within the healing period in which he suffers a total incapacity to earn wages. *Arkansas State Highway & Transportation Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

Though the respondents now refuse to accommodate the claimant's light-duty work restrictions, the fact remains that the claimant is capable of working and has been capable of working and earning wages ever since her injury, albeit not with the respondent-employer. She has also been able to continue pursuing her education. Given these facts, I find that the claimant has failed to prove by a preponderance of the evidence that she is totally incapacitated from earning wages. Therefore, I conclude that the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits.

## **AWARD**

The claimant has proven by a preponderance of the evidence that she sustained a compensable injury and that the medical treatment she has received to date has been reasonably necessary in connection with the compensable injury. The respondents are hereby directed and ordered to pay benefits in accordance with the findings of fact and conclusions of law set forth herein.

No indemnity benefits have been awarded herein. An attorney's fee may be awarded only on indemnity benefits owed and controverted. ARK. CODE ANN. § 11-9-715. Therefore, no attorney's fees are awarded herein.

All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid pursuant to Ark. Code Ann. § 11-9-809.

**IT IS SO ORDERED.**

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**HON. J. MARK WHITE**  
Administrative Law Judge